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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-955

JAMES M. POWELL,

Petitioner,

v.

RONALD V. DELLUMS, *et al.*,

Respondents.

No. 77-1129

JERRY V. WILSON, CHIEF, METROPOLITAN POLICE DEPARTMENT and DISTRICT OF COLUMBIA,

Petitioners,

v.

HONORABLE RONALD V. DELLUMS, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

ISSUES PRESENTED

1. Whether prior recent decisions of this Court holding that a police officer making an arrest possesses a qualified immunity, based upon a reasonable good faith belief, rather than an absolute immunity, should be reversed.

2. Whether testimony by numerous witnesses, including police officials and an Assistant United States Attorney, that plaintiffs' Capitol steps demonstration was peaceful and orderly is sufficient to justify a jury verdict finding the arrests unlawful.

3. Whether the decision in Bivens affords a cause of action for violation of First Amendment rights.

4. Whether the exclusion of municipal liability from 42 U.S.C. §1983, which does not apply in the District of Columbia, has any bearing on the respondeat superior liability of the District, a Congressionally created municipality whose local courts recognize such liability.

5. Whether the application of a local D. C. statute requiring a six-months' notice for tort claims against the City raises any issue meriting review by this Court.

COUNTER-STATEMENT OF THE CASE

The government seeks review of a jury verdict holding petitioners liable in damages for the unlawful arrest, and prolonged detention under oppressive conditions, of approximately 1,200 persons assembled to petition on the steps of the United States Capitol on May 5, 1971.

The arrests were ordered by petitioner Chief of the Capitol Police Powell, and carried out by officers of the Metropolitan Police Department of the District of Columbia, acting under the direction and control of respondent Chief Wilson and of Deputy Chief Zanders of the Metropolitan Police, both of whom were present.

Following the arrests, in July, 1971, eight of the demonstrators were prosecuted in a three-week trial on charges of violation of the Capitol Grounds statute (D.C.C. §9-124) and Unlawful Entry (D.C.C. §22-3102).[1/] After hearing conflicting

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1/ In the year following these arrests, this Court summarily affirmed a three-judge ruling that the Capitol Grounds statute, which prohibits all assemblages on the Capitol Grounds, is unconstitutional. Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F.Supp. 575 (D.D.C. 3-judge Court), aff'd, 409 U.S. 972 (1972). At the time of the arrests, the Capitol Grounds statute was considered by the police to be enforceable only against disorderly assemblages, that is, those which were disruptive or which created more noise than is generally permitted at the Capitol, pursuant to the ruling in United States v. Nicholson, 97 Wash.L.Reptr. No. 137, 1213 (D.C.Gen.Sess. 1969), aff'd, 263 A.2d 56 (D.C.C.A. 1970).

testimony as to whether the demonstration was unruly and disruptive (as Chief Powell and his witnesses testified), or peaceful and orderly (as the demonstrators and their witnesses testified), and after viewing a Metropolitan Police sound film of the demonstration, the jury acquitted the eight defendants. Thereafter, the charges against the remainder of the approximately 1,200 persons arrested were dropped.

In November, 1971, respondent Dellums and a number of those arrested filed the present class action seeking damages for violation of their constitutional rights. In January, 1975, following a six-week trial, the jury awarded damages to Dellums, and to each member of the class for unlawful arrest, malicious prosecution, and violation of First Amendment rights.

The testimony at trial showed that on the morning of May 5, 1971, leaders of the demonstration made arrangements with Congressmen Dellums, Mitchell and Rangel and Congresswoman Abzug to meet with the group on the east House steps at 2:45 p.m. and to participate with them in a ceremonial presentation of the "People's Peace Treaty". (App. 317). The group first assembled on the Mall and marched in loose formation down Independence Avenue toward the Capitol. (App. 291, 2389). The marchers proceeded on the sidewalk, stopped at red lights and were assisted by Metropolitan Police Department officers along the way. (App. 291-92). At the Capitol they were at first stopped by Capitol Police Inspector Xander, then allowed to proceed. (App. 1171, 1172, 321-22, 1560).

Led by the members of Congress, the demonstrators filed onto the steps in an orderly "almost processional" fashion. (App. 512, 534, 322, 2073,

2383, 2394). While waiting for the entire group to assemble and speeches to begin, those assembled participated in singing and chanting. (App. 2390, 2393, 2385).

The group was predominantly young and jovial. (App. 511). There was no evidence of any violence. (App. 1497). As the speeches by members of Congress got under way (App. 2384, 2386), the crowd listened attentively (App. 1502), responding to the speeches by cheering and applauding at various times. (App. 326, 352, 698, 706, 787, 2395, 2385, 2388). At no time was the crowd disorderly or unruly. Chief Wilson at trial conceded that it was "a reasonably orderly crowd" (App. 961), and M.P.D. Capt. Albert Ferguson deemed it "a fairly mild demonstration". (App. 1846). Congressman Rangel testified that Chief Powell later that evening expressed his regrets about the arrests:

> . . . Chief Powell was very uncomfortable and indicated to me at that point that he agreed that the defendants were not that disorderly and that it was a peaceful crowd, but that there was nothing that he could do. . . . He had indicated to me that it was one of the more peaceful crowds that he had seen on the Capitol steps."
> (App. 2166).

Although the House was in session while the demonstration was in progress, no noise from the demonstrators could be heard in the House chamber. (App. 380, 713). Just inside the building from the House steps and with windows opening onto the demonstration, the House Ways & Means Committee was holding a meeting. Although some members of the Committee were aware of the demonstration going on,

the transcript of the meeting reflects no concern about noise, the Committee was able to carry on its business throughout the demonstration and adjourned at its usual time of 4:30 p.m. (App. 1358, 1548).

After the plaintiff class members had assembled (App. 2383-95), Special Operations Division (S.O.D.) officers of the M.P.D. formed a line across the bottom of the steps, facing upward toward the demonstrators. (App. 2387, 2391). At approximately 3:15 or 3:20 p.m., Chief Powell gave and repeated over his bullhorn an order to disperse (App. 1176-79), which was not heard by the vast majority of the crowd. (App. 298, 415, 436, 577, 634, 654, 660, 668, 675, 729, 732, 2078, 746, 775, 782, 786, 857).[2/] Chief Powell told Chief Wilson that he thought many people had not heard the order to leave, and asked Wilson if he thought the order should be given again. Wilson said "No, let them tell their story in court". (App. 645).

Chief Powell then ordered the arrests, and officers of the Metropolitan Police Department, acting under the direction and control of petitioner Chief Wilson and MPD Deputy Chief Zanders, and over the protests of the Congress members, proceeded to take the demonstrators into custody and to photograph them and load them in police transport vehicles. Throughout the arrests, the "People's Peace Treaty" continued to be read aloud from the top of the steps. When the police reached the top, they seized and tore up the document. (App. 634-36).

2/ Assistant U. S. Attorney David Larimer testified that he was within fifty feet of Chief Powell at all times, but did not hear any order to disperse (App. 536). Although a police sound truck was present and on hand (App. 578), it was not used.

The police film of the demonstration, although introduced in the 1971 criminal prosecution and subpoenaed by plaintiffs for the civil damages trial, was not produced, having been destroyed by the police (see concurring opinion of Judge Leventhal, n. 3, at Powell Certiorari Petition, p. 77a).

It was also shown that prior to and during the demonstrations of May 2 through 5, 1971, a series of meetings was convened at the Justice Department by Attorney General Mitchell and Deputy Attorney General Kleindienst, with Presidential aides and police officials (including petitioners Powell and Wilson) attending, to plan the handling of the anti-war demonstrations scheduled for that week. The emphasis, initiated by John Ehrlichman, was on extraordinary measures. Despite Chief Wilson's suggestions at several meetings that most demonstrators did not intend to engage in disruption (Minutes of Justice Department Meeting, May 1, 1971, Pl. Exh. 12A, p. 4; Minutes of May 2, 1971, Pl.Exh. 12C, pp. 1-2), Ehrlichman emphasized that "no fine tuning was needed" (Pl.Exh. 12A, supra at 9), and Kleindienst stated that "the government's obligation was to disperse the demonstrators so that they would leave the City". (Minutes of second May 1st meeting, Pl.Exh. 12B, at 1). Kleindienst also stated that "the general impetus of the program" was to arrest as many demonstrators as possible to deter further demonstrations. (Pl.Exh. 12C, supra at 4).

On May 3, 1971, almost 8,000 persons were arrested, and on May 4th, another 3,000 were arrested after being escorted by police under Wilson's command to a peaceful demonstration at the Justice Department. The May 5th Capitol steps arrests of 1,200 persons were the final mass arrests. Of the almost 13,000 persons arrested that week, the government was able to sustain no convictions. See

Sullivan v. Murphy, 478 F.2d 938 (D.C.Cir.), cert. denied, 414 U.S. 880 (1973), on remand, 380 F.Supp. 867 (D.C.Cir. 1974).

As noted, at the conclusion of the six-week trial, the jury -- like the jury in the 1971 prosecution of eight of the demonstrators — refused to credit the testimony of Chief Powell, and instead rendered a verdict for plaintiffs.

The Court of Appeals affirmed the award of damages for unlawful arrest, vacated the award for cruel and unusual punishment, ordered a new trial on the claim of malicious prosecution, and, while upholding the finding of violation of First Amendment rights, remanded for a redetermination of damages.

ARGUMENT

I. THIS COURT HAS REFUSED IN FOUR RECENT CASES TO GRANT ABSOLUTE IMMUNITY TO POLICE ACTIONS; FURTHER REVIEW IS UNWARRANTED.

A police officer possesses only a qualified immunity, and not an absolute immunity, in connection with the making of an arrest. Pierson v. Ray, 386 U.S. 547, 555, 18 L.Ed.2d 288, 295 (1967); Scheuer v. Rhodes, 416 U.S. 232, 245, 40 L.Ed.2d 90, 103 (1974); Imbler v. Pachtman, 424 U.S. 409, 418-19, 47 L.Ed.2d 128, 136-37 (1976); Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972) (on remand).

This Court has, in the past, applied a standard of absolute immunity only to those officials whose jobs entail a significant element of

discretion. Barr v. Matteo, 360 U.S. 564, 3 L.Ed. 2d 1434 (1959). By contrast, the action of a police officer in making an arrest has never been considered "discretionary" but rather "ministerial". Bivens v. Six Unknown Named Agents, supra, at 1346; Carter v. Carlson, 144 U.S.App.D.C. 388, 447 F.2d 358 (1971), rev'd on other grounds, sub nom, District of Columbia v. Carter, 409 U.S. 418 (1973); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L.Rev. 209, 218-19 (1963); Note, "Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense", 49 Temple L.Q. 938, 944 (1976).

The qualified immunity standard applicable to both federal and local police officers was enunciated in Bivens, supra, at 1348:

> . . . The officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable.

This standard has been applied by numerous lower courts in cases under §1983 as well as cases arising directly under the Constitution.3/

3/ Burgwin v. Mattson, 522 F.2d 1213 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (1976) (§1983 action); Boscarino v. Nelson, 518 F.2d 879 (7th Cir. 1975) (§1983 action); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) (§1983 action); Brubaker v. King, 505 F.2d 534 (7th Cir. 1974) (§1983 action); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973) (§1983 action); Rodriguez v. Jones, 473 F.2d 599 (5th Cir.), cert. denied, 412 U.S. 953 (1973) (§1983 action); Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) (Bivens standard applies to First Amend-

(Continued)

Nor is there any sound reason to grant federal officials greater immunity for Constitutional wrongs than that granted officials sued under 42 U.S.C. §1983. See, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1346-47 (2d Cir. 1972) (on remand). See also, Apton v. Wilson, 506 F.2d 83, 92-93 (D.C. Cir. 1974); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146, 1159 (4th Cir. 1974); Bethea v. Reid, 445 F.2d 1163, 1166 (3rd Cir. 1971), cert. denied, 404 U.S. 1061 (1972). Indeed, principles of federalism call for greater, not lesser, accountability for federal officials. See, e.g., The Federalist No. 28; Laurence Tribe, American Constitutional Law, pp. 2-3 (1978); Cf. Buckley v. Valeo, 424 U.S. 1, 291 (Rehnquist, J. concurring and dissenting).

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ment); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975) (Bivens standard applies to First Amendment); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974) (Bivens standard covers Fifth Amendment); Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972) (Potential liability based on Bivens and not §1983); Revis v. Laird, 391 F.Supp. 1133 (E.D.Cal. 1975) (Bivens standard applies to First, Fourth and Fifth Amendments); Peacock v. Board of Regents, 380 F.Supp. 1081 (D.Ariz. 1974) (Bivens standard applies to First Amendment); Butler v. United States, 365 F.Supp. 1035 (D.Haw. 1973) (Bivens standard covers First Amendment).

II. THERE WAS AMPLE EVIDENCE FROM WHICH THE JURY COULD CONCLUDE THAT PETITIONERS DID NOT ACT REASONABLY OR IN GOOD FAITH.

A jury verdict supported by substantial evidence may not be overturned even though the trial judge or appellate court would have reached a different conclusion.

The sharply varying versions of what occurred, as attested by Chief Powell and a few police associates on the one hand, and by dozens of demonstrator witnesses on the other, was noted in both the Opinion for the Court by Judge Wright (Petition, pp. 54a-55a) and in Judge Leventhal's concurring opinion (Pet., p. 85a). As Judge Leventhal observed:

> . . . Chief Powell viewed the demonstration as "a disorderly, hostile and violent crowd" and argued that his concern for the safety of the Congress, as well as the noise of the crowd, justified his action. Plaintiffs portray the arrests as stemming from a concerted effort by law enforcement authorities to end dissent by arresting dissenters. Plaintiffs' witnesses testified that this was a nonviolent, reasonably orderly assembly seeking to present a petition and hear the addresses of several Congressmen.

The jury credited plaintiffs' characterization of the demonstration. Since reliance on the intelligence and fairness of the well-instructed jury is central to our system of justice, we respect the jury's resolution of these major factual issues.

Despite Chief Powell's self-serving testimony to the contrary, there was voluminous evidence that he did not and could not reasonably or in good faith have believed that the arrests were warranted.

There was abundant evidence that the group was not disruptive, not violent, not disorderly, and no more noisy than other groups commonly permitted to assemble on the Capitol steps. (App. 326, 352, 540, 698, 706, 787, 1341, 1505, 1497, 1699, 2074-75, 2080, 960, 655, 1339-40, 665, 705, 1504). The demonstrators first sang and chanted, then listened attentively to the speeches, responding by applause and cheering to the passages with which they agreed. (App. 326, 352, 540, 698, 706, 787, 1341, 2074-75, 2080). In addition to the many plaintiffs' witnesses, Chief Wilson and Captain Ferguson of the Metropolitan Police Department conceded that "it was a reasonably orderly crowd" and "a fairly mild demonstration". (App. 960, 1846). In fact, Chief Powell himself conceded apologetically to Congressman Rangel, later that evening, that it was one of the more peaceful demonstrations he had ever seen on the Capitol steps. (App. 2164). Based upon this testimony, Chief Powell could not reasonably have believed that the plaintiffs were within the category of persons which Nicholson held could be ordered from the Capitol Grounds.

Powell's lack of reasonable good faith belief that the members of the crowd heard his order and refused to leave is also confirmed by:

1. His statement to Chief Wilson that he did not think many people heard him, followed by his acquiescence in Chief Wilson's advice not to repeat the order. (App. 643-44).

2. His failure to use an available police sound truck. (App. 578).

3. His refusal, after being informed by three members of Congress that they had not heard any order to leave, to either repeat the announcement, or to permit the members of Congress to request the group to leave. (App. 335).

4. His excuse for not repeating the announcement that "It wouldn't be fair to those [fifteen to twenty-five] persons already arrested [at that point]." (App. 335).

The above excerpts from the evidence, much of which was uncontradicted, lead to the conclusion that there was abundant evidence that Chief Powell did not have reasonable grounds, and could not in good faith have believed that he had reasonable grounds to arrest. The jury's verdict was clearly supported by substantial evidence.

As the court below stated:

> . . . the action below was in the mold of the classic jury trial. In the course of a six-week trial over 60 witnesses appeared. The evidence was starkly clashing. The plaintiffs told of a peaceful and reasonably well organized march from the Mall to the Capitol and of a gathering on the steps that may have been marred by a few instances of misbehavior on the fringes but was on the whole peaceful, attentive, and no more noisy than other groups routinely allowed to use the Capitol for like purposes. The plaintiffs also told of police indifference to civil and human rights which was alleged to have been part of a conspiracy to quiet dissent through false arrest

> and preventive detention. Chief Powell, like our Brother Tamm, told of a week of violence and disorder, of intelligence concerning plans to invade the Capitol buildings, of fear for the safety of congressmen and congressional staff, and of noise, disorder, and confusion on the Capitol steps. This mass of conflict, teeming with issues of credibility, went to the jury under an elaborate set of instructions which are, for the most part, impeccably correct.
> (Pet., 54a-55a.)

III. THE CONSTITUTION AFFORDS A CAUSE OF ACTION FOR VIOLATION OF FIRST AMENDMENT RIGHTS.

Although Justice Harlan, in Bivens, cautioned that the "appropriateness of money damages may well vary with the nature of the personal right asserted." Bivens, supra, 403 U.S. at 409 n. 9, there is no reason to distinguish Fourth Amendment from First Amendment violations. See Stanford v. Texas, 379 U.S. 476, 484-83 (1965), quoting favorably from Justice Douglas' dissenting opinion in Frank v. Maryland, 359 U.S. 360, 376 (1959) to the effect that:

> Three amendments [i.e., the First, Fourth and Fifth] are indeed closely related, safeguarding not only privacy and protecting against self-incrimination but "conscience and human dignity and freedom of expression as well."

This Court quite recently unanimously approved, in principle, back pay and reinstatement as remedies for First and Fourteenth Amendment violations of a non-tenured school teacher.

Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471 (1977). In that case, this Court addressed and dealt with the problem of defining the elements of a First Amendment cause of action in that context. Id. at 483-84. This approach has also been adopted by numerous lower courts which have expressly recognized the propriety of suits for damages jurisdictionally grounded directly in the First Amendment and 28 U.S.C. §1331. See, e.g., Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975); Revis v. Laird, 391 F.Supp. 1133 (E.D.Cal. 1975); Peacock v. Board of Regents, 380 F.Supp. 1081 (Ariz. 1974); Butler v. United States, 365 F. Supp. 1035 (D.Haw. 1973).

IV. THERE IS NO CONGRESSIONAL POLICY AGAINST IMPOSING BIVENS LIABILITY ON THE DISTRICT OF COLUMBIA.

In Moor v. County of Alameda, 411 U.S. 693 (1973), this Court held that a municipality could not be held vicariously liable for damages under 42 U.S.C. §1983 because that would circumvent Congressional omission of municipal liability from that statute.

However, 42 U.S.C. §1983 was held in District of Columbia v. Carter, 409 U.S. 418 (1973), not to apply in the District, a municipality over which Congress has plenary power. At the same time, the Court noted the availability of a Bivens remedy. 409 U.S. at 433.

The extension of respondeat superior to the District in this case is consistent with local

law,[4/] violates no statutory policy precluding municipal liability, and treads on no principles of federalism inasmuch as the District is a federal municipality.

It is clear that §1983 was drafted and enacted for the limited purpose of enforcing the provisions of the Fourteenth Amendment. See, Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2d 705, 715 (1972). To allow a cause of action to arise "directly" under the Fourteenth Amendment against parties as to whom Congress refused to extend liability under §1983 might indeed be allowing through the back door what was forbidden to enter through the front. However, whatever tempest may be brewing in the circuits over this question does not extend to the general applicability of Bivens to violations of constitutional rights other than those covered by §1983. This Court has recognized the precise nature of the existing conflict — and by so doing has clearly shown why the instant case (which does not involve the Fourteenth Amendment) is not part of that controversy — in Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471, 478 (1977):

> The question of whether the board's argument should prevail, or whether . . . we should by analogy to our decision in Bivens . . . imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in Section 1983 is one which has never been decided by this court. Counsel for respondent . . . suggested that it is an extremely important

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4/ See Wade v. District of Columbia, 310 A.2d 857 (1973).

question and one which should not be decided on this record. We agree with respondent. (emphasis added).

The arguments that Chief Wilson was not involved, or that he and the District are not liable because Metropolitan Police had come under the command of Chief Powell, fly in the face of the contrary testimony of Chief Wilson and Deputy Chief Zanders. (See, Opinion of Court below, District's Petition, pp. 3a-4a).

In addition, there is no congressional policy opposed to the application of respondeat superior liability on the District of Columbia. As has been discussed, the exemption pursuant to §1983 should not be read broadly as freeing municipalities from all manner of liability. As the exemption of the District of Columbia from the reach of §1983 was patterned on the exemption of federal officers, see, District of Columbia v. Carter, supra, 409 U.S. at 424-25, the scope of respondeat superior is more accurately analogized to the provisions in the Federal Tort Claims Act than to the exemptions in §1983. Pursuant to 1973 amendments to the Federal Tort Claims Act, codified at 28 U.S.C. §2680(h) (supp. V 1975), the federal government is in many cases liable for the intentional torts of federal agents. This liability cures the devastating defect of Bivens that individual federal officers are often judgment-proof. This same respondeat superior principal should apply to the District of Columbia government for the torts of District of Columbia agents and was so applied by the court below.

V. THE NOTICE PROVIDED TO PETITIONERS PURSUANT TO 12 D.C.CODE §309 CONSTITUTED ADEQUATE NOTICE, AND DOES NOT WARRANT REVIEW BY THIS COURT.

The District of Columbia asserts that the respondents are barred from recovering damages from the District government because they did not comply with the statutory notice requirement of D.C.Code, 1973, §12-309.

It is uncontroverted, however, that timely notice of the class claim was given to the District of Columbia in a letter dated November 4, 1971, from Special Counsel of the American Civil Liberties Union Fund, which named sixty-five (65) persons as representatives of "approximately 1200 claimants whom we represent" who had been unlawfully arrested on the Capitol steps. (App. 2396). This letter alerted the District government that the injuries received by the sixty-five (65) named claimants were "typical of those sustained by the group of (1200) claimants as a whole." The District was thus put on notice that the claim was made on behalf of approximately 1,200 persons arising out of a single incident.

It has been repeatedly held by both local and federal courts that a narrow and technical construction of what is required to satisfy §12-309 is inappropriate, and that the statute should be construed broadly so as to minimize the number of claims it might otherwise bar. Hurd v. District of Columbia, 106 A.2d 702 (Mun.Ct.App. 1954); Stone v. District of Columbia, 237 F.2d 28, cert. denied, 352 U.S. 934 (D.C.App. 1956); Hirshfeld v. District of Columbia, 254 F.2d 774 (D.C.Cir. 1958). The District of Columbia's analogy to cases under the Federal Tort Claims Act prohibiting class notice is inapposite. The administrative notice requirement of the F.T.C.A., 28 U.S.C. §2675(a), has its

roots in the administrative legal practice in which exhaustion of administrative remedies prior to institution of legal action remains an essential factor. The notice requirement under the F.T.C.A. is, therefore, jurisdictional. The District of Columbia notice requirement, on the other hand, serves merely a notice function to trigger an investigation so that evidence may be obtained and preserved. See, H.Rep. No. 2010, 72nd Cong., 2nd Sess. (1933). The District notice requirement is not jurisdictional and is waived unless raised as an affirmative defense. F. W. Woolworth Company v. Stoddard, 156 A.2d 229, 231 (Mun.C.App.D.C. 1959).

Thus, in the instant case, there was compliance with the District of Columbia notice requirement when the respondents disclosed their intent to file suit on behalf of themselves and approximately 1200 members of a class described in the notice, the identities of the individual members of which class were contained in records prepared and maintained by District agents as part of the very action that was the subject of the notice.5/

Finally, there is no reason for this Court to review the lower court's interpretation of §12-309 as it is purely a matter of local law; has no adverse or inconsistent impact on prior determinations of the same issue by courts in the jurisdiction; raises no important question of federal law and is a totally consistent and reasonable interpretation of a local ordinance. See, U. S. Supreme Court Rule 19, 28 U.S.C.A.

5/ Even if plaintiffs had not given notice, the District of Columbia could not utilize §12-309 to bar their claims. The instant case arises under the Constitution of the United States. The district court's jurisdiction is authorized by 28

(Continued)

CONCLUSION

For the reasons stated, the Petitions for Writ of Certiorari should be denied.

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U.S.C. §1331. Where federal constitutional rights are allegedly infringed, the action is governed by federal law, and local law is not allowed to interfere with the availability of a federal remedy. Sullivan v. Murphy, 156 U.S.App.D.C. 28, 478 F.2d 938, cert. denied, 414 U.S. 1880 (1973).